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No. 93-1504

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE CELOTEX CORPORATION,
Petitioner,

v.

BENNIE EDWARDS AND JOANN EDWARDS,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals for the Fifth Circuit

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BRIEF OF AMICUS CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENTS

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13pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, and Rules

Other Authorities

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] is a voluntary national bar association whose approximately 60,000 members primarily represent injured plaintiffs in civil actions. Written consents of both parties to the filing of this brief have been filed with the Clerk of the Court.

Indeed, most of the people who have bonded judgments against Celotex are represented by members of ATLA. Trials of cases on behalf of these clients result in judgments that are appealed by the adverse party. The judgments obtained on

behalf of those clients are secured on appeal by the posting of surety bonds. Both the clients of ATLA members and the parties adverse to those clients rely on the usefulness and integrity of surety bonds to protect the judgment on appeal while a stay of execution of the judgment is in effect. ATLA's members have a great interest in knowing whether surety bonds posted to secure judgments on appeal are adequate to serve their intended purpose or whether ATLA's members, in representing their clients, should object to the use of surety bonds because they will not be honored in the event of the bankruptcy of the judgment debtor.

ATLA is interested in the impact of the bankruptcy court's 11 U.S.C.A. §105(a) injunction has had outside of the immediate bankruptcy context. ATLA presents a broader perspective of the overall impact on the Section 105(a) injunction on post-judgment procedures than the other parties to this case.

STATEMENT OF THE CASE

The Edwards obtained one of over 100 money judgments against Celotex on account of asbestos-caused disease or death. The vast majority of those judgments were for compensatory damages only. Appendix to Amicus Brief of Northbrook at A-22 to A-111, *Edwards v. Celotex Corp.*, 6 F.3d 312, 318 (5th Cir. 1993). The Edwards' judgment included both compensatory and punitive damages. Celotex appealed virtually every judgment entered against it in an asbestos disease case. To obtain a stay of execution pending appeal, Celotex posted a surety bond in each case. The surety bond, on its face, was a promise to pay the judgment creditor the amount of the bond conditioned only on the judgment being affirmed and Celotex not paying the judgment. Joint Appendix at 12-17. In October 1994, it will have been four years since Celotex filed its bankruptcy petition. To date, none of the judgments has been paid. Nor has the surety paid the amount of any of the bonds issued.

The surety bonds were filed by insurance companies that has written liability insurance policies for Celotex. The bonds were secured by those insurance policies. Brief for Petitioner at 16. The manner in which the bonds were financed was not disclosed to the judgment creditors nor to the courts where the bonds were posted. Fed. R. Civ. P. 62(d) provides that by posting a supersedeas bond a judgment debtor may obtain a stay of execution, ". . . when the supersedeas bond is approved by the court." The convoluted financing mechanism utilized by Celotex and its insurers, such as Northbrook, to obtain and post surety bonds was information withheld from the courts whose job it was to pass on the adequacy of the bonds to secure judgment on appeal.

Because the judgment creditors were not given information concerning the financing of the bonds, and the bonds themselves gave no indication they were subject to any limitation or condition other than stated on the face of the bond, the judgment creditors, such as the Edwards, were deprived of the opportunity to object to the bonds on the basis of the manner in which they were financed.

SUMMARY OF ARGUMENT

In 1789 Congress enacted a statute providing for the posting of good and sufficient security by which a judgment debtor could obtain a stay of execution pending appeal. This resulted in a smooth, efficient, uniform and reliable procedure in state and federal courts for handling this aspect of post-judgment procedure.

The 11 U.S.C.A. §105(a) injunction issued by the Celotex bankruptcy court virtually destroys the utility of surety bonds as security on appeal. The injunction disrupts long established procedures utilized by parties and courts for orderly administration of appeals by calling into question the

usefulness of surety bonds to perform their intended function of providing a stay of execution pending appeal, while protecting the judgment creditor's ability to ultimately collect.

The injunction places an unfair burden on judgment creditors of modest means by forcing them to travel to the bankruptcy court to seek relief from the stay, rather than applying to the court where the bond is filed. Fed. R. Civ. P. 65.1. With the spectre of surety bonds being useless to secure a judgment on appeal, injured people will be subject to an unfair negotiating tactic, being persuaded to accept settlement of claims for less than reasonable amounts.

ARGUMENT

THE BANKRUPTCY COURT ORDER DESTROYS THE PURPOSE AND UTILITY OF SURETY BONDS TO OBTAIN A STAY OF EXECUTION DURING APPEAL.

The Celotex bankruptcy court 11 U.S.C.A. §105(a) injunction destroys the purpose of surety bonds as security on appeal. That purpose is to permit the judgment debtor to obtain a stay of execution of the judgment pending appeal and insure that the judgment creditor's ability to collect the judgment is not impaired because of the stay of execution. The surety bond guarantees payment of a judgment if the judgment is affirmed on appeal and thereafter the judgment debtor fails to pay the judgment. The principal eventuality making a judgment uncollectable after appeal is the insolvency of the judgment debtor. It is that eventuality against which a surety bond provides protection.

The operation of the Celotex §105(a) injunction if bizarre. It turns the purpose of surety bonds upside down.

The very purpose of the bonds was to protect judgment creditors such as the Edwards in the event Celotex became insolvent, filed bankruptcy or otherwise became unable to pay the judgment. Then, when the precise eventuality against which the bond was to protect occurs -- insolvency and bankruptcy -- the judgment creditor is enjoined from collecting on the bond.

This Alice in a legal wonderland result is one which this Court should not accept. *Edwards v. Celotex Corp.*, 6 F.3d 312, 319 (5th Cir. 1993); *Grubb v. Federal Deposit Ins. Corp.*, 833 F.2d 222, 226 (10th Cir. 1987). A supersedeas bond is supposed to "guarantee" payment of the judgment should the judgment be affirmed. *Muck v. Arapahoe County District Court*, 814 P.2d 869 (Colo. 1991); *Seventh Elect Church v. Rogers*, 660 P.2d 280, 34 Wash. App. 105 (1983). The Celotex §105(a) injunction destroys that guarantee.

A. Orderly and Established Post-Judgment Procedures are Disrupted.

The procedures and the purpose for obtaining a stay of execution of a judgment pending appeal have been long established. They were created in England, imported to the American colonies, codified in the United States in 1789, and made the subject of a Supreme Court rule in 1867. *Koontz v. Omaha Hotel Company*, 107 U.S. 378, 380-87 (1882). The Celotex §105(a) injunction attacking the integrity of such bonds comes, therefore, against a background of over 200 years of the bar and litigants having utilized surety bonds on appeal with confidence in their ability to accomplish their intended function.

When a judgment is obtained, execution in aid of collecting the judgment can issue. Fed. R. Civ. P. 69. By posting a supersedeas bond the judgment debtor obtains a stay of execution and avoids disruption of its activities that would occur due to collection efforts (such as attachment,

garnishment, and execution on assets). If the judgment is reversed on appeal, the judgment debtor is not faced with the need to reclaim from the judgment creditor assets obtained through Rule 69 procedures.

The judgment creditor is protected because the judgment is secured by the bond. This prevents the judgment creditor from being prejudiced due to the stay of execution pending appeal. Requiring court approval of the surety bond under Fed. R. Civ. P. 62(d) insures that the surety is substantial and will be available to make good on the bond. If it appears that the sureties are inadequate or the bond was approved based on inadequate disclosure of pertinent facts concerning the sureties, it may be rejected and a new bond refused. *Florida Central R. Co. v. Schulte*, 100 U.S. 644, 646 (1879)

Before the Celotex §105(a) injunction, creditors whose judgments were secured on appeals by a surety bond were secure in the belief that the surety bond would perform its stated purpose. In the 205 years since Congress passed a statute authorizing the use of "good and sufficient" security for supersedeas purposes, no case had ever held that surety bonds were subject to bankruptcy court injunction. The Celotex §105(a) injunction disrupts and jeopardizes this process. It destroys the expectations of the parties to the judgment and of the courts which approved the surety bond and ordered the stay of execution. It destroys the confidence in the utility of surety bonds to perform their intended function. It destroys the ability of courts and parties to rely on surety bonds to secure payment of a judgment. This is especially true in this case, where the unusual financing mechanism for the surety bonds was not disclosed to the court or to the judgment creditors.[1] Now Celotex seeks to go

[1]In this context it is noteworthy that in the months before filing bankruptcy, Celotex paid hundreds of thousands of dollars to settle cases pending against it. No effort has ever been made by Celotex to set aside or void any of the transfers made to settle cases. This underscores the fact that the financing mechanism for the bonds provides the principal basis for arguing that the bonds should be set aside as preferential transfers. It also casts doubt on the Celotex argument that it is interested in treating "all creditors" equally. Last minute settlement payments surely depleted Celotex's assts to the detriment of other claimants. Celotex, however, has made no effort to retrieve those last minute settlement payments.

back four years, to 1990, to void the surety bonds it issued. Brief for Petitioner at 44.

The bankruptcy court order casts doubt upon the usefulness of surety bonds to secure judgments on appeal, especially in those cases where such surety is most needed -- where the judgment debtor has financial problems. The impact of the Celotex §105(a) injunction in destroying confidence in surety bonds to secure judgments on appeal is already being felt.

Delaware and Colorado state courts have recently, in asbestos disease cases, rejected surety bonds as security on appeal and required a deposit in court of cash in the amount of the judgment. *Owens Corning Fiberglas Corp. v. Carter*, 630 A.2d 647 (Del. 1993); *Cardenas v. Owens Corning Fiberglas Corp.*, No. 94CA606 (Colo. App. 1994)(affirming state district court order requiring Owens Corning to deposit over one million dollars with the court). The uncertainty engendered by the Celotex §105(a) injunction is the reason compelling these courts to reject surety bonds and to require a cash payment as security on appeal. The Celotex bankruptcy court's §105(a) injunction has managed, by itself, to infect a long-established and efficient procedure for post-judgment stays of execution and securing of judgments on appeal.

The fact that a surety bond is rejected and a cash transfer is ordered reflects a debtor with questionable economic health. Requiring a cash transfer as security on appeal further burdens an already burdened debtor. Such a cash transfer may

force a bankruptcy when it would have been avoided if a surety bond had been available to secure the judgment pending appeal. Nonetheless, a court cannot be criticized for rejecting a surety bond when there is reasonable doubt that it will serve the purpose that it was once assumed, as a matter of course, that it would serve. This Court can restore the usefulness of surety bonds to secure judgments on appeal by answering the certified question in the affirmative.

Judgment creditors objecting to the use of surety bonds are opposed by judgment debtors who understandably do not want to transfer cash to secure the judgment pending appeal. Therefore, the doubt cast by the bankruptcy court's order causes additional litigation over the supersedeas security issue. In the *Carter* and *Cardenas* cases, supra, that litigation reached the appellate level.

There are several litigated issues when a judgment creditor objects to use of a surety bond. What is the judgment debtor's financial condition? It is such that a judgment creditor and the trial court will be reasonably concerned about the vitality of the judgment debtor at the end of appeal? In viewing the debtor future financial prospects, is bankruptcy a valid concern? In a bankruptcy or other similar proceeding, will a surety bond prove adequate to insure the judgment is paid. *See, e.g., Carter, supra*, for a list of factors to be weighed in deciding whether to reject a surety bond.

B. Fairness and Convenience to Judgment Creditors Is Impaired.

Fed. R. Civ. P. 65.1 gives jurisdiction to the court where the bond is filed, generally the forum where the case was tried. The §105(a) injunction ignores Rule 65.1 and requires judgment creditors to travel to Florida to ask for relief. In this case, relief was denied. Brief of Petitioner at 16. In other cases, the bankruptcy court refuses to make any ruling on a request for relief from the stay, leaving the bond holder in

perpetual limbo and ongoing hardship. Mealy's Litigation Reports, Asbestos, Vol. 9, No. 12, at 7 and E1 - E4 (July 15, 1994). This is avoided by application of Rule 65.1, permitting enforcement of the bond in the court where the plaintiff obtained the judgment.

C. An Unfair Negotiating Tool is Given to Judgment Debtors.

An additional effect of the Celotex §105(a) injunction is to hand to defendants a lever to unfairly force settlement of meritorious claims for amounts below what would otherwise be viewed as reasonable. The argument made by such defendants is, "Even if you get a judgment, we will forestall collection by posting a surety bond and appealing. By the time the appeal is concluded we will have filed bankruptcy and you will lose the protection of the surety bond -- you will collect nothing."

Appealing a case, whether or not the appeal has genuine merit, is a regularly employed tactic to forestall payment of a judgment. The threat of appeal is regularly used as a negotiating tool. In the past, the threat of an appeal as a bargaining chip has been somewhat mitigated because of the security of a bonded judgment. When the threat of appeal as accompanied by a threat of bankruptcy which will render a surety bond useless for its intended purpose, a judgment creditor may be unfairly pressured into giving up rights that ought to be protected through a surety bond.

One of the reasons for harmed individuals of modest economic standing , such as the Edwards, to assume the substantial expense and other risks of trial is in knowing that if they obtain a judgment it will be satisfied, either by execution against the judgment debtor, or through the surety bond posted as security on appeal. If the security of a bonded judgment is lost, such individuals may be deterred from seeking compensation at all, or may be unfairly persuaded to

accept far less compensation than their losses would otherwise warrant. In other words, the risk of a surety bond being effectively nullified by a bankruptcy court should not be added to the risks of delay and an adverse outcome on appeal.

Most of the bonds in the Celotex bankruptcy secure judgments for compensatory damages. The bond holders, who in this case suffer serious diseases or are the survivors of those who died from asbestos-caused illness, remain uncompensated. They ran the gauntlet of trial and appeal, and they were unable to execute their judgments due to the surety bonds that were posted. They should not now be put in a worse position for accepting a surety bond than they would have been had there been no surety bond and they had been able to execute on their judgments.

CONCLUSION

For these reasons, Amicus urges this Court to answer the certified question in the affirmative.

Respectfully submitted,

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